

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 373 of 1999

CONVERTED FROM

CRIMINAL MISC.APPLICATION No 2201 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

HARENDRA VALLABHDAS KANABAR

Versus

STATE OF GUJARAT

Appearance:

MR AD SHAH for Petitioner

MR KT DAVE ADDL.PUBLIC PROSECUTOR for State

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 16/04/99

ORAL JUDGEMENT

Rule. Service of rule is waived by Mr.
K.T.Dave, the learned APP for the State. At the request

of the learned advocates representing the parties, the matter is taken on hand for final hearing and disposal today.

2. By this application under Art.226 of the Constitution of the India, the petitioner prays for quashing of the administrative order of transfer of a case from one court to another passed by the learned Sessions Judge at Jamnagar.

3. Necessary facts in order to appreciate rival contentions may be stated. Against the present petitioner, a complaint of the offences punishable under Secs.302- 201- 109- 120B and 498A read with 114 of the Indian Penal Code came to be lodged with Jam Khambhaliya Police Station. During the course of the investigation, the petitioner was arrested. He was produced before the learned Judicial Magistrate (First Class) at Jam Khambhaliya. The police prayed for the remand for 14 days. The learned Judicial Magistrate (First Class) at Jam Khambhaliya was pleased to grant Police remand for 7 days. on 20th March, 1999. The learned advocate representing the petitioner urged the learned Judicial Magistrate (First Class) to stay the order for few days as revision application was to be preferred before the Sessions Judge at Jamnagar. The learned Judicial Magistrate (First Class) was pleased to stay the order he passed. The petitioner then preferred Criminal Revision Application No.43 of 1999 in Sessions Court at Jamnagar which was made over to the learned Additional Sessions Judge (Mr.M.V.Rathod) for hearing and disposal in accordance with law. As the State also preferred Criminal Revision Application No.44 of 1999 for getting the remand of more than seven days, that revision also was transferred to the same learned Additional Sessions Judge for hearing and disposal in accordance with law. Both the revision applications were heard together by the learned Additional Sessions Judge at Jamnagar on 24th March, 1999, 30th March, 1999 and 31st March, 1999. Hearing of both the revision applications was over on 31st March, 1999 and the matter was adjourned to 9th April, 1999 for pronouncement of judgment. On 1st April, 1999, the learned Sessions Judge, Jamnagar passed the order on administrative side withdrawing both the revision applications from the file of the learned Additional Sessions Judge at Jamnagar and transferring the same to the court of another Additional Sessions Judge (Mr.B.N.Karia), Jamnagar. Being aggrieved by such administrative order, the present petitioner has preferred this application for getting the stay order quashed initially under Sec. 482 of Criminal Procedure

Code, but later on under Art. 226 of the Constitution of India.

4. Mr. A.D.Shah, the learned Advocate representing the petitioner has contended that the cases are to be assigned, made over or transferred or withdrawn under the Criminal Procedure Code. Such type of withdrawal being inconsistent with Sec.409 of Criminal Procedure Code, the order passed is required to be quashed under Sec. 482. According to him, even if the administrative order is passed, the same cannot be allowed to run counter to any of the provisions of the Criminal Procedure Code or statute applicable. In reply to such contention, Mr. Dave, the learned APP has contended that whenever administrative order is passed, it would not be just and proper on the part of this court to interfere with the same, because the same is independent of any of the provisions of the Criminal Procedure Code, and constitutional powers may not be exercised as there is no justification.

5. I may deal with the later half of the contention first. The question which is posed before me is whether the administrative order about withdrawal, if passed by the learned Sessions Judge, is open to judicial review, because it is the contention of the learned APP that it is not so open. We have accepted the rule of law and no authority can pass any order dehors any of the provisions of the statutes or Code applicable. If the administrative order is to be passed, it must be in consonance with the provisions of the law applicable and if it is not so, the court will interfere with the same and quash, if found to be inconsistent with the provisions of law. In this case, therefore, the court can interfere or dissect the merits or demerits of the order passed or even examine the legality of the administrative order under Art. 226 of the Constitution, if not under Sec. 482 Criminal Procedure Code.

6. Whether it was open to the learned Sessions Judge to withdraw and transfer the case to another court is the next point that arises for consideration. The relevant provision in the Code being Sec.409 must be borne in mind. As per that provision, the learned Sessions Judge has the power to transfer the case or any appeal from order, recall case or appeal which he has made over to any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him, but if he has to withdraw or recall any case or appeal which he has made over to any Additional sessions Judge, he can do so before the trial of the case or hearing of the case has commenced. The

word "case" includes revision application too, because the word "case" is to be interpreted in wider context. In this case, the learned Sessions Judge has withdrawn both the revision applications after the hearing before the learned Sessions Judge was over and the matters were posted for pronouncement of the judgment only. In view of sub-clause (2) of Sec.409 of Criminal Procedure Code, it is not open to the learned Sessions Judge to recall the same, wherein the hearing is over. In this case, when the learned Sessions Judge prefers to withdraw the same not before the hearing had commenced but after the hearing was over and matters were resting for pronouncement of the judgments, the same being contrary to the provision of Sec.409(2) of the Code is illegal and the same is required to be quashed, invoking Art.226 of the Constitution of India.

6. No decision on the point, when the section itself is very clear, is necessary in support of my view. Suffice it to say, however the decision rendered by this court, if referred to. In the case of Gambhirsinhji Bhavsinhji Padheriya Vs. State of Gujarat, 1993(1) G.L.H. 433, wherein likewise question arose. Dealing with the same from different angles, it is clearly laid down that once the case is made over to any Additional Sessions Judge, the same cannot be withdrawn, if the hearing has commenced. The withdrawal is permitted only when the hearing has not commenced i.e. before the hearing in the matter commences. In that case also, the cases were withdrawn after the hearing had commenced. It was, therefore, held that the learned Sessions Judge could not have resorted to said provision of the Code for the simple reason that trial had already commenced. In that case, then resorting to Sec.482 of Criminal Procedure Code, the order recalling the cases from the file of the learned Additional Sessions Judge, Rajkot was quashed, and the cases were again assigned to the original court for hearing and disposal in accordance with law. In view of such law made clear by this court and aforesaid provisions, the order passed by the learned Sessions Judge, Jamnagar on administrative side being illegal, is required to be quashed and the revision applications which are recalled are again required to be transferred to the original court of the learned Additional Sessions Judge, Jamnagar for hearing and disposal in accordance with law.

7. It may be stated that the remarks of the learned Sessions Judge, Jamnagar were called for. He has submitted his remarks. Reading the same, it appears that the learned Public Prosecutor, Jamnagar had, writing a

letter, requested the learned Sessions Judge to withdraw the cases and transfer to another court and the administrative order was passed. When the party had moved for transfer of the cases, making out the ground for the same, the learned Judge ought not to have passed such order on administrative side. He should have heard the petitioner and then ought to have passed the order on Judicial side. As that is not done, the order also cannot be, on this ground, maintained.

8. For the aforesaid reasons, this application is required to be allowed. The same is allowed accordingly. The order of the learned Sessions Judge, Jamnagar passed on 1/4/1999 recalling both the revision applications being Criminal Revision Application No. 43 of 1999 and Criminal Revision Application No. 44 of 1999 is hereby quashed and set aside. Both the aforesaid revision applications are ordered to be transferred back to the Court of the learned Additional Sessions Judge, Jamnagar (Mr. M.V.Rathod). On receipt of the Record and Proceedings, the learned Additional Sessions Judge (Mr. M.V.Rathod) shall hear and dispose both the revision applications of, in accordance with law latest by 21st April, 1999. The learned Sessions Judge and the Additional Sessions Judge (Mr.B.N.Karia) are directed to send down the Record and Proceedings of both the revision applications to the Court of the learned Additional Sessions Judge (Mr.M.V.Rathod), Jamnagar immediately, for further progress.

Rule accordingly made absolute. Direct Service is permitted.

Date: 16/4/1999.
(ccshah)